Burrill's & Evarts' Brief

U. S. Supreme Court.

THE PEOPLE, *ex rel.* FRANCIS A. PALMER, Pl'ff in Error,
agst.
THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW-YORK, Def'ts in Error.

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THE PEOPLE, *ex rel.* HENRY J. BEERS, Pl'ff in Error,
agst.
THE SAME, Def'ts in Error.

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THE PEOPLE, *ex rel.* JOHN BODINE, Pl'ff in Error,
agst.
THE SAME, Def'ts in Error.

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THE PEOPLE, *ex rel.* RALPH MEAD, Pl'ff in Error,
agst.
THE SAME, Def'ts in Error.

307.

These are writs of error on behalf of the several relators to review judgments of the Court of Appeals of the State of New-York, affirming judgments of the Supreme Court of said State, rendered upon returns to writs of *certiorari* issued on behalf of said relators, and by which judgments the action of the Commissioners, defendants in error, in assessing certain bank shares owned by the relators, was sustained.

In the first three suits, in which Palmer, Bodine and Beers were relators, the bank, the shares in which were the subject of assessment, was the National Broadway Bank, a national bank organized under and by virtue of the acts of Congress in that behalf made. While in the other case, in which Mead is the relator, the bank was the Corn Exchange Bank, a State bank, organized under an act of the Legislature of the State of New-York, passed April 18, 1838, known as the General Banking Law, and other acts amendatory thereof. (Case, Mead, fol. 10.) The capital of each of these banks consisted of United States bonds and stocks, exempt from taxation by acts of Congress. (Case, fol. 17.) Each of said banks was located in the City of New-York. Palmer and Mead were both residents of the City and County of New-York, liable to taxation in that city.

Beers was a non-resident of the State, and a resident of Fairfield, Connecticut, and there assessed, and was not assessed in the City of New-York in respect to any property except the bank shares in question.

Case, Beers, fols. 10, 12.

Bodine was a non-resident of the City of New-York, but a resident of the State, living in Queens County, where he was assessed, and was not assessed in the City of New-York in respect to any property except the bank shares in question.

Case, Bodine, fols. 10, 12.

The authority of the Commissioners to make the assessments in question is (as they claim in the return) derived from an act of the Legislature of the State of New-York, passed April 23, 1866, and recorded in chapter 761 of the laws of the Legislature of said State for the year 1866. (See Vol. 2 of Laws of 1866, page 1647.)

Case, fol. 20.

The first section of that act is in these words:

SECTION 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized

under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein, said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum, as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided, further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, but the same shall be subject to State, county, municipal and other taxation, to the same extent and rate, and in the same manner as other real estate is taxed.

In making the assessments the Commissioners deducted from the capital of the bank the assessed value of its real estate, and estimated the shares at their value at par as proportionable part of such reduced capital; (Case, fols. 30, 31;) but they refused to make any allowances or deduction for any portion of the capital stock of the banks, invested in the stocks, bonds and securities of the United States. (Case, fols. 17, 18.)

It appears that insurance companies created under the laws of the State of New-York, and doing business in the City of New-York, are assessed upon the balance or residue only of their capital and surplus profits liable to taxation, after making the deductions required by the laws of the State, *and after deducting also therefrom the amount of bonds and other securities of the United States declared*

by Congress to be exempt from taxation by or under State or municipal authority.

And it also appears, that in assessing individuals, in respect to all personal estate other than bank shares, such part of their estate as was invested in such bonds and securities was also exempted, while in assessing the value of bank shares the Commissioners refused to make any allowance or deduction for or in respect to such Government securities. (Case, fols. 17, 18.)

The provisions of a previous act of the same Legislature, passed March 9, 1865, known as the enabling act, and which, by its 10th and 11th sections, attempted to tax National bank shares, and which were decided by this court, in 2 *Wallace*, to be illegal, were repealed by the act of April 23, 1866; so that the right of the respondents to tax shares of banks, whether State or National, so far as State legislation is concerned, must depend on the last mentioned act of April 23, 1866.

The Supreme Court of the State of New-York, in the present cases, sustained the validity of the act of April 23, 1866, and the lawfulness of the taxation of the relators' shares of stock, and the judgment of that court was affirmed by the Court of Appeals of the State of New-York, but no opinions were delivered by either court.

The questions which arise in the present cases are:

1. Whether the act of 23d April, 1866, is valid so far as it attempts to authorize the taxation of bank shares where the capital of such bank is invested in United States securities, exempt from taxation under the acts of Congress; and the question will be considered separately in respect to State banks, and to those organized under National laws.

2. Whether, assuming the right of State authority to tax such bank shares, the State of New-York, by the act in question, had power to tax the shares of shareholders who resided out of the State of New-York.

3. Whether the taxation of the shares of the several relators is not invalid for the reason that an illegal discrimination is made in favor of other State corporations and individuals, citizens of said State.

In making this statement the counsel for the plaintiff in error proceeds upon the theory that the question first above mentioned was not decided by this court in the case of Churchill *vs.* City of Utica, but that it is open for discussion here.

POINTS.

FIRST.—The act of the Legislature of April 23, 1866, so far as it authorizes the taxation of the shares of NATIONAL banks created under and by virtue of the act of Congress of February 25, 1863, and the acts amendatory thereof, is illegal.

1. Because banks thus established being agents of the Government, and organized for public uses, are not subject to State or Municipal taxation.

2. Because the tax upon the shares is virtually a tax upon the property of the bank, and of the securities in which the same is invested.

   See Points of the respondents in Churchill *vs.* City of Utica, 33 *New-York Rep.* 160, and in U. S. Supreme Court.

3. The act in question derives no support from the proviso in the act of Congress of February 25, 1863, because—1. Congress had not the power to tax such institutions; and, 2. If it has such power, the same cannot be delegated to the States.

   See Points in 33 *N. Y.* 160.

   Also printed Points in same case in Supreme Court United States, submitted herewith; also opinions of Ch. J. Chase and Justice Nelson, submitted herewith.

SECOND.—There is no act of Congress authorizing the taxation of shares of State banks whose capital is invested in United States securities, and the State, in asserting its right to tax such shares, cannot invoke any power or authority from Congress, but must maintain such right as one of State sovereignty. It is evident from the opinions in the case of Churchill, in 33 *N. Y.* 160, and in this court, that the court, in sustaining the assessment and the State law under which it was made, place its judgment upon the proviso in the 41st section of the act of Congress of February 23, 1863.

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The question is now presented whether, in the absence of any act of Congress authorizing the taxation of the shares of STATE banks, whose capital is invested in Government securities, such taxation by the State can be supported.

On this point we submit:

1. The United States securities, in which the capital of the Corn Exchange Bank, which is a State Bank, is invested, are included within the provision of the act of Congress, that such securities, "whether held by individuals, corporations or associations, shall be exempt from taxation by or under State authority."

   Act of 1862, § 2, Vol. 13, p. 346.

2. It is settled, in adjudications of the Supreme Court of the United States, that the capital of such bank cannot be taxed upon any measure or computation of it which includes the investment in these United States securities, thus exempt by law from State taxation.

   Bank of Commerce *vs.* Commissioners, 2 *Black.* 620.
   The People *vs.* Commissioners, 2 *Wallace*, 200.

3. It is also adjudicated by the Supreme Court of

the United States, upon a unanimous judgment of that court, that a tax, incompetent to State authority when assessed to the corporation or association as owner, and upon its capital in bulk, is equally incompetent to State authority when assessed to the shareholder as owner, and upon his shares.

Churchill *vs.* City of Utica, *S. C. U. S.* 1866. See opinions of Ch. J. Chase, and of Justice Nelson, and brief of counsel for Churchill, in that case, submitted herewith.

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4. The tax complained of by the relators, depending for its validity, as it does, upon the mere vigor of the legislation of the State of New-York, and being without aid from any legislation or permission of Congress, is necessarily invalid as respects the investment of the bank, in United States securities, exempt from taxation.

THIRD.—In making the assessment, the Commissioners discriminated against the shareholders of national banks, and in favor of insurance companies and individuals, by refusing to make to the former the same allowance which is made to the latter on account of investments in United States securities, and have thus assessed "such shareholders at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," in violation of the act of Congress above referred to.

Opinion C. J. Chase, in Churchill *agst.* City of Utica, U. S. Supreme Court.

Under laws of N.Y. "corporations" are taxed on capital from which U.S. securities are deducted

23 N.Y.R. 193
33 " 209

The only permissive legislation of Congress touching the subject of State taxation of the shares of National Banks is found in the 41st section of the National Currency act of June 3, 1864.

U. S. Stat. vol. 13, p. 111.

And the only permissive State legislation touching the taxation of shares of State Banks is the act of April 23, 1866, and by each of said acts it is provided that such taxation shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

FOURTH.—In the assessments in question the Commissioners erred in not making an allowance for the portion of the capital of the banks invested in United States securities, exempt from taxation.

1. The act of the Legislature of the State of New-York of April 23, 1866, does not in terms provide that in making the assessments thereby authorized allowance shall not be made on account of such investments in Government securities.

2. It is not necessary so to construe said act for the purpose of giving full effect to it.

3. If such be the fair and reasonable construction of the act, it is illegal; because, as stated under other points, the taxation of such shares is actually and in effect a taxation of the property of the bank, and of the securities in which such property is invested.

On contrary the 1st proviso of 41 sec. shows that allowance should be made for investments in U.S. securities,

4. The proviso in the act of Congress above referred to does not give any validity to such assessment, or to the act of April 23, 1866, under which it is made.

(a.) Such act of Congress does not on its face pretend to authorize an assessment of shares of banks whose capital is invested in United States securities.

(*b.*) It is not necessary so to construe the act, in order to give it full effect, because the act creating the National Banks does not require that all the capital of the National Banks should be invested in Government securities, and the shares might well be taxed on a valuation made in respect to the portion of the capital otherwise invested.

(*c.*) Congress has no power to tax the shares of banks, either National or State, whose capital is invested in securities of the United States exempt from taxation under the Constitution.

(*d.*) If Congress have such power, it has no right to delegate it to the States.

See Points in 33 *N. Y. R.* pp. 193, 204, and Points of Counsel, in Churchill, in United States Supreme Court, page 37; Opinion of C. J. Chase, in same case.

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5. In the taxation by the State of New-York of insurance companies and in that of individuals, in respect to all property other than bank shares, such allowance has been made.

Case, fols. 17, 18.
Act of April 20, 1866.

FIFTH.—The State of New-York had no right to tax the shares of shareholders who were not residents of the State, whether the bank be State or National.

1. According to our theory of taxation, taxes are assessed upon property and not upon the person.

People *vs.* Commissioners, 23 *N. Y. R.* 234.
Churchill *vs.* City of Utica, 33 *Ib.* 160.

4 Wheat 316

2. The right of taxation by a State, in respect to one not a citizen, is confined to property the *situs* of which is within its jurisdiction and territorial limits.

Same cases.

3. The bank shares in question are not personal property, located within this State, but are mere choses in action, having no other *situs* than that of the domicil of the owner.

Union Bank *vs.* State, 9 *Yerger*, 490.
State *vs.* Ross, 3 *Zabriskie*, 517.
Angell & Ames on Corporations, secs. 437, 458.
Redfield on Railways, p. 38.
City of Evansville *vs.* Hall, 14 *Indiana R.* 27, citing *Angell & Ames*, § 316.
Cromwell *vs.* Town, 15 *Ind.* 151.
City of Davenport *vs.* Miss. Co. 12 *Iowa*, 539.

4. In order to make shares of National Banks the subject of taxation, and to establish that the taxation of shares was not a taxation of the property or assets of the bank, the courts have been driven so to define "*shares*" as to prevent their having any other locality besides the domicil of the owner.

Churchill *vs.* City of Utica, 33 *N. Y. R.* 160.
Opinion of the Court, p. 237.
Points of Counsel, S. C. pp. 164, 165.
2 *Bailey's R.* 754, State *vs.* Collector.
1 *Nott & McCord*, 527, Bulow *vs.* City of Charleston, where a tax on shares is sustained as a tax on *income*—as a personal and not a property tax.

See, also, the definition of *shares* in
Wildman *vs.* Wildman, 9 *Vesey* 177.
Kirby *vs.* Potter, 4 *Vesey*, 754.

See, also, Howe *vs.* Starkweather, 17 *Mass.* 243, that shares cannot be sold under *fi. fa.*

of Nelson
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5. If the State of New-York cannot, by virtue of its sovereignty, tax these shares because neither they nor the owner are subject to its jurisdiction, Congress cannot confer any such power upon it; and the proviso in the forty-first section of the act of Congress of the 25th February, 1863, is ineffectual for any such purpose, even if it should be held to confer the power of taxation in any case.

6. The act last referred to does not, in terms, declare that the shares of non-residents of the State shall be taxed in the place where the bank is situated, nor is it essential for the purpose of giving effect to the act that any such construction should be given to it.

7. Such act merely provides that if the State have the power of taxation, it shall not be affected by such acts.

SIXTH.—The non-resident of the State of New-York, who is a holder of shares of a National Bank located in that State, is taxable at the place of his domicil in respect thereto as a part of his personal estate.

The authority of the State of New-York to tax the shares of such non-resident shareholder cannot be sustained without subjecting such shareholder to taxation by two independent States in respect to the same property, or depriving the State of his domicil, of its right of taxation, by transferring such right to the State of New-York.

SEVENTH.—The act of April 23, 1866, is illegal, on account of its attempted interference with the internal